Supreme Court, U.S.
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No. 95-1569

IN THE

Supreme Court Of The United States

OCTOBER TERM 1995

CHRISTOPHER S. SIDWELL,
Petitioner,

v.

EXPRESS CONTAINER SERVICES, INC.,
Respondent,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Intervenor/Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the U.S. Court of Appeals for the Fourth Circuit err in defining "other adjoining area," as set forth in 33 U.S.C. § 903(a), in terms of location with respect to navigable waters and function with respect to maritime use?

PARTIES TO THE PROCEEDING

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(Continued on next page)

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[1] This party has no parent or subsidiary corporate affiliation.

PARTIES TO THE PROCEEDING

(Continued from previous page)

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[2] The Director, Office of Workers' Compensation Programs, was dismissed as a party respondent by the Court of Appeals for the Fourth Circuit. The Director was subsequently allowed to intervene and was required by the court to be aligned with the Petitioner. The Director is shown as a Respondent in the Petition for Writ of Certiorari only because of the requirements of Supreme Court Rule 12.6. It is Respondent ECS's position that the Director is not a proper party to these proceedings, based on this Court's decision in ***Director, OWCP v. Newport News Shipbuilding & Drydock Co.***, 115 S.Ct. 1278 (1995). Moreover, the Director has not filed a timely response supporting the Petition as required by Rule 12.6, but has filed a request to extend the time for filing, which Respondent ECS has opposed. It has been suggested that the Director should no longer be listed as a party to these proceedings, but no Motion to that effect has been filed pending the ruling on the request for extension of time.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 2

STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 3

ARGUMENTS FOR DENYING THE PETITION 7

I. **The Petition for Writ of Certiorari exaggerates the conflict between the circuits.** 7

II. **The resolution of the conflict between the Fourth Circuit and the other circuits is irrelevant to the outcome of this case.** 15

III. **The Decision of the Fourth Circuit in this case is consistent with prior decisions of other panels of the Court of Appeals for the Fourth Circuit.** 16

CONCLUSION 20

TABLE OF AUTHORITIES

CASES *PAGE*

Alabama Drydock & Shipbuilding Co. v. Kininess, 554 F.2d 176 (5th Cir.), *cert. denied*, 434 U.S. 903 (1977) 13

Brady-Hamilton Stevedore Co. v. Herron, 568 F.2d 137 (9th Cir. 1978) 5, 6, 8, 9, 10, 11, 14, 15, 18

Director, OWCP v. Newport News Shipbuilding & Drydock Co., 115 S.Ct. 1278 (1995) iii

Humphries v. Director, OWCP, 834 F.2d 372 (4th Cir. 1987), *cert. denied* 485 U.S. 1028 (1988) 16-19

Newport News Shipbuilding & Drydock Company v. Graham, 573 F.2d 167 (4th Cir.), *cert. denied*, 439 U.S. 979 (1978) 16-18

Northeast Marine Terminal, Inc. v. Caputo, 432 U.S. 249 (1977) 11

Sea-Land Service, Inc. v. Director, OWCP, 540 F.2d 629 (3d Cir. 1976) 11, 18

Sidwell v. Express Container Services, Inc., 71 F.3d 1134 (4th Cir. 1995) 4, 6, 12, 13, 16-19

Texports Stevedore Co. v. Winchester,
632 F.2d 504 (5th Cir. 1980),
cert. denied, 452 U.S.
905 (1981) 5, 6, 9, 10, 11, 14, 18

Triguero v. Consolidated Rail Corp.,
932 F.2d 95 (2d Cir. 1991) 10, 11

RULES & REGULATIONS

Longshore and Harbor Workers'
Compensation Act, 33 U.S.C.
Section 901, et seq. 3, 5, 6, 7, 9, 10, 17

33 U.S.C. § 902(3) 7

33 U.S.C. § 903(a) ..... i, 5, 7, 8, 9

U.S. Supreme Court Rule 12.6 iii

OPINIONS BELOW

Decision of Administrative Law Judge Richard K. Malamphy, dated May 7, 1992: ***Sidwell v. Express Container Services, Inc.***, 26 BRBS 127 (ALJ) 1991 (ALJ No. 91-LHC-2042).

Decision of the Benefits Review Board, United States Department of Labor, dated December 29, 1994: ***Sidwell v. Express Container Services, Inc.***, BRB NO. 92-1720 (1994).

Decision of the United States Court of Appeals for the Fourth Circuit: ***Sidwell v. Express Container Services, Inc.***,71 F.3d 1134 (4th Cir. December 28, 1995) (No. 95-1101).

STATEMENT OF JURISDICTION

The Statement of Jurisdiction was correctly presented in the Petition for Writ of Certiorari.

STATUTORY PROVISIONS

The Petition for Writ of Certiorari correctly sets forth the statutory provision at issue in this matter.

STATEMENT OF THE CASE

This matter involves a claim for workers' compensation benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. Section 901, et seq. ("LHWCA" or the "Act"). The matter was heard before Administrative Law Judge Richard K. Malamphy of the United States Department of Labor to determine whether there was jurisdiction under the LHWCA with respect to the injuries suffered by Petitioner, Christopher S. Sidwell, on June 11, 1990.

Petitioner was injured while working for Respondent, Express Container Services, Inc. ("ECS"), as a container mechanic at a facility located on Chautauqua Avenue in Portsmouth, Virginia. ECS is in the business of repairing cargo containers and the chassis used to carry them. ECS's facility was previously located near the gate of Portsmouth Marine Terminals ("Terminal"), where

vessels are loaded and unloaded from the Elizabeth River. In 1985, the Terminal expanded and purchased ECS's facility at which time ECS relocated to its present facility, eight-tenths of a mile from the Terminal. The current location is surrounded by various businesses and residential developments. ECS contracts directly with steamship lines and does not have any agreement with the Terminal itself. Approximately 90% of the containers and chassis arrive at the Chautauqua facility by inland roads, while the remainder come from the Terminal. ***Sidwell v. Express Container Services, Inc.***, 71 F.3d 1134, 1135 (4th Cir. 1995). (App. A at III-IV).[3]

The Administrative Law Judge dismissed the claim because he found that the Chautauqua site did not meet the situs requirements of the Act. That is, it was not an

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[3] Citation to "App." refers to Petitioner's Appendices to the Petition for Writ of Certiorari. Note that Appendix C (the Decision of the Administrative Law Judge) has also been attached to this Brief because the pages are not in the correct order in Petitioner's Appendix C.

area "adjoining" navigable waters as required by 33 U.S.C. § 903(a). In making this determination, the Administrative Law Judge utilized the "functional relationship" test enunciated by the Ninth Circuit in ***Brady-Hamilton Stevedore Co. v. Herron***, 568 F.2d 137 (9th Cir. 1978). (App. C).

Claimant requested review of that decision before the Benefits Review Board, the appropriate reviewing agency. By Order dated December 29, 1994, the Board affirmed, also utilizing the functional relationship analysis.

Claimant requested review before the United States Court of Appeals for the Fourth Circuit. In affirming, the panel examined both the Ninth Circuit approach and the "totality of the circumstances" test adopted by the Fifth Circuit in ***Texports Stevedore Co. v. Winchester***, 632 F.2d 504 (5th Cir. 1980), ***cert. denied***, 452 U.S. 905 (1981), but chose to adopt a simpler, but similar approach. The panel stated that "[t]he plain language of the LHWCA requires

that covered situses actually 'adjoin' navigable waters . . ." *Id.* (App. A at XV). In addition, the panel held, the "area" where the injury occurred must be a "discrete shoreside facility" which is "customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel." ***Sidwell***, 71 F.3d at 1139. (App. at XIX-XXI). Thus, the Fourth Circuit adopted a situs test which is based on the plain language of the statute and examines both function *and* location.

The Court of Appeals also pointed out that under ***Brady-Hamilton***, and even a ***Texports*** "totality of the circumstances" test, claimant would not have met the situs requirements of the Act. *Id.* at 1141, n. 12. (App. A. at XXVI).

ARGUMENTS FOR DENYING THE PETITION

I. The Petition for Writ of Certiorari exaggerates the conflict between the circuits.

The Petitioner correctly points out that a number of circuits have considered the situs aspect of jurisdiction under the Longshore and Harbor Workers' Compensation Act. However, the tests utilized by the various circuits are not as different as the Petitioner suggests and, it is submitted, the differences that do exist do not amount to a matter of national significance.

The crux of the dispute centers on Congress's 1972 addition of a "situs" requirement for jurisdiction under the LHWCA. Assuming that an injured employee has requisite maritime "status," as defined in 33 U.S.C. § 902(3), jurisdiction will only attach when the injury occurs on a specific "situs." 33 U.S.C. § 903(a) limits coverage to:

> [a]ny injury occurring upon the navigable waters of the United States (including any

> adjoining pier, wharf, drydock, terminal, building way, marine railway, or *other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel*).

(emphasis added). Because the injury to the Petitioner herein, and the other cases cited, did not occur upon navigable waters or one of the enumerated areas, the question revolves around the limits of the phrase "other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel."

In ***Brady-Hamilton Stevedore Co. v. Herron***, 568 F.2d 137 (9th Cir. 1978), then Judge Kennedy wrote for the Ninth Circuit:

> In order to further Congress' goal of uniform coverage, the phrase "adjoining area" should be read to describe a *functional relationship* that does not, in all cases, depend upon physical contiguity. Consideration should be given to the following facts, among others, in determining whether or not a site is an "adjoining area" under § 903(a): the particular suitability of the site for the maritime uses referred to in the statute;

> whether adjoining properties are devoted primarily to use in maritime commerce; the proximity of the site to the waterway; and whether the site is as close to the waterway as is feasible given all of the circumstances in the case.

Id. at 141 (emphasis added).

In ***Texports Stevedore Co. v. Winchester***, 632 F.2d 504 (5th Cir. 1980), ***cert. denied***, 452 U.S. 905 (1981), an *en banc* Fifth Circuit utilized a less specific "totality of the circumstances" test:

> All circumstances must be examined. Nevertheless, outer limits of the maritime area will not be extended to extremes.

Id. at 514. In further defining "adjoining area," that court noted that "[s]o long as the site is close to or in the vicinity of navigable waters, or in a neighboring area, employee's injury can come within the LHWCA." *Id.* Further, "[t]he perimeter of an area is defined by function. The 'area' must be one customarily used by an employer in loading,

unloading, repairing or building a vessel." *Id.* at 515. The court went on to examine the facts of the particular case and looked to factors very similar to the ones enumerated by the Ninth Circuit:

> [I]n this case, the . . . gear room was not clearly outside the waterfront area customarily used by employers for gear rooms. . . . The ALJ found that the gear room operations were part of the ongoing, overall loading process . . . He found that the gear room was "in the most desirable position for servicing the docks" . . . and that the gear rooms of most stevedores were not on the docks proper . . . . The gear room was as close to the dock as was feasible . . . . Not only does the area **adjoin the navigable waterway**, but the gear room itself has a sufficient nexus to the waterfront.

Id. at 515 (emphasis added).

Finally, in ***Triguero v. Consolidated Rail Corp.***, 932 F.2d 95 (2d Cir. 1991), a panel of the Second Circuit utilized a very similar "test" for situs. The ***Triguero*** court cited the ***Brady-Hamilton*** test with approval and also

looked to whether the situs of the injury was "an integral part of the shipyard despite the distance of the situs from the waterway." *Id.* at 100-101.[4] Thus, the ***Triguero*** court essentially adopted the ***Brady-Hamilton*** "functional" approach.

When the tests for situs espoused by each of these circuits is examined closely, it becomes obvious that the Fifth (***Texports***) and Ninth Circuits' (***Brady-Hamilton***) approaches are more similar than they are different and, when analyzed side by side with the Fourth Circuit test, it is obvious that there is not an intolerable conflict which must be addressed by this Court. The Fourth Circuit adopted a test which examines function and location just as the other circuits did. The test created by the Fourth Circuit is arguably simpler and, consequently, easier to

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[4] Respondent agrees with Petitioner's position that ***Sea-Land Service, Inc. v. Director, OWCP***, 540 F.2d 629 (3d Cir. 1978), was discredited by this Court in ***Northeast Marine Terminal, Inc. v. Caputo***, 432 U.S. 249 (1977) and is not a factor in the argument. (Petition at 11, n. 3).

apply, but it is not as dramatic a departure as the Petitioner asserts. The Petitioner's focus on the "adjoining" aspect of the situs test obscures the totality of the Fourth Circuit's holding, which requires an examination of both *location* and *function* in order to determine situs.

The ***Sidwell*** panel examined the plain meaning of the statute and found that, as to "adjoining" navigable waters, the area must be contiguous or otherwise touch such waters. While that language may at first glance appear more restrictive than the Ninth or Fifth Circuits' formulations, the differences are not significant. The Fourth Circuit took care to point out that "it is the parcel of land that must adjoin navigable waters, not the particular square foot on that parcel upon which a plaintiff is injured . . . . the physical distance is not decisive . . . . The test is whether the situs is within a contiguous shipbuilding area which adjoins the water." ***Sidwell***, 71 F.3d

at 1140, n. 11, quoting ***Alabama Drydock & Shipbuilding Co. v. Kininess***, 554 F.2d 176, 178 (5th Cir.), ***cert. denied***, 434 U.S. 903 (1977). (App. A at XXI-XXII).

Having determined the meaning of "adjoining," the court next examined the meaning of "area," stating: "the statute specifies that coverage extends to injuries sustained on "any adjoining pier, wharf, drydock, terminal, building way, marine rail way, *or other adjoining area . . .*" ***Sidwell***, 71 F.3d at 1139. (App. A at XIX). The court instructed that "area" must be defined with reference to this language of qualification. Next, examining the use of the word "other," the court stated: "use of the word 'other' following the enumerated adjoining areas confirms that the scope and nature of the 'other adjoining areas' are to be defined by reference to the enumerated area[s]. . . ." Therefore, an "other adjoining area" as to which coverage extends must be *like* a pier, wharf, drydock, terminal, building way, or marine railway, that is, a *discrete shoreside*

structure or facility. *Id*. Finally, the asserted area must be customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel, as the statute provides.

Thus, like the Fifth and Ninth Circuits, the Fourth Circuit situs test examines function, as well as location. The Ninth Circuit looks to the "functional relationship" of the injury situs to maritime use, but also examines the proximity of the injury situs to the waterway. ***Brady-Hamilton***, 568 F.2d at 141. The Fifth Circuit looks to the "totality of the circumstances," but notes that the perimeter of the area is "defined by function," as well as proximity to the navigable waterway. ***Texports***, 632 F.2d at 514, 515. While the Fourth Circuit does create a clearer line, perhaps, than that set forth by other circuits, the Fourth Circuit situs test does not subject longshoremen in Virginia to an intolerably different scope of coverage than longshoremen in Louisiana, California or New York.

II. **The resolution of the conflict between the Fourth Circuit and the other circuits is irrelevant to the outcome of this case.**

The Fourth Circuit took care to point out that, under the facts of the case before them, Petitioner's injury did not occur on a covered situs even if the Ninth Circuit's "functional relationship" or the Fifth Circuit's "totality of the circumstances" tests were utilized. In Footnote 12 of the Opinion, the court stated:

> ECS also fails the ***Brady-Hamilton*** test and even a "totality of the circumstances test." The ALJ expressly found that "there are no outstanding characteristics of the situs that make it especially suitable for maritime use," the adjoining properties are not devoted primarily to maritime uses (indeed, many of them are residential), the terminal gates are 8\10 of a mile from the site, and the water is even farther . . . . Therefore, even if we had declined to read the statute as it is written, and had instead adopted the ***Brady-Hamilton*** test, or simply looked to the totality of the circumstances, we would still have affirmed the Board.

Sidwell, 71 F.3d at 1141, n 12. (App. A at XXVI).

Thus, even if this Court were to grant the Petition for Writ of Certiorari and find that the Fourth Circuit situs test is not correct, the facts as determined by the Administrative Law Judge and affirmed by the Benefits Review Board would support a finding of no covered situs under all of the other formulations of the situs test.

III. The Decision of the Fourth Circuit in this case is consistent with prior decisions of other panels of the Court of Appeals for the Fourth Circuit.

Prior to *Sidwell*, the Fourth Circuit had considered the situs question in two cases, without ever developing a comprehensive test. ***Newport News Shipbuilding & Drydock Company v. Graham***, 573 F.2d 167 (4th Cir.), ***cert. denied***, 439 U.S. 979 (1978); ***Humphries v. Director, OWCP***, 834 F.2d 372 (4th Cir. 1987), ***cert. denied*** 485 U.S. 1028 (1988).

In ***Sidwell***, the Fourth Circuit acknowledged these prior decisions, noted the lack of a "touchstone for all future LHWCA jurisdictional questions" and declared, "we now decide how it should be determined in this circuit whether the situs requirement of the LHWCA is satisfied." ***Sidwell***, 71 F.3d at 1138 (App. A at XIII).

Thus, the Fourth Circuit itself addressed whether its prior decisions were determinative of the situs issue and decided they were not. An analysis of ***Graham*** and ***Humphries*** confirms that, prior to ***Sidwell***, there was no comprehensive situs test in the Fourth Circuit. ***Graham*** contains a brief, one paragraph discussion of the issue. The ***Graham*** court found that two sites, a submarine shop and a foundry, 120 and 3,000 feet from the water's edge satisfied the situs test because they were an "integral part" of the shipyard. ***Graham***, 573 F.2d at 169.

In ***Humphries***, the Fourth Circuit engaged in a much more lengthy discussion of situs and examined the ***Brady-Hamilton***, ***Sea-Land***, and ***Texports*** approaches. Ultimately, however, the court *expressly declined* to establish a comprehensive test and simply recited a number of factors which resulted in a conclusion that the accident in that case did not occur on a maritime situs. *Id.* at 375. Among the factors considered by the court were that the accident occurred over a mile from the Terminal, along a "public highway which did not connect any portions of [the employer's] operations or traverse continuous or contiguous terminal areas." *Id.* In addition, the restaurant where the injury occurred was "separated from the Elizabeth River and the nearest maritime terminal by a residential neighborhood." *Id.*

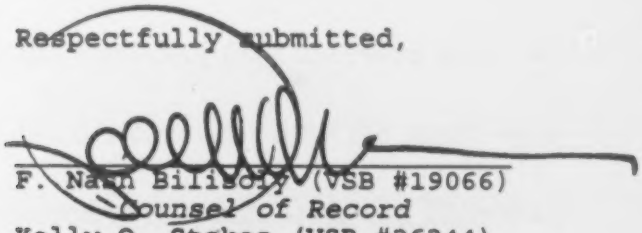
Thus, contrary to the assertions of Petitioner, ***Sidwell*** does not conflict with Fourth Circuit precedent. In ***Graham***, the Fourth Circuit barely addressed the situs

issue. In ***Humphries***, the Fourth Circuit expressly declined to state a "touchstone" for all future decisions. In ***Sidwell***, however, the time was ripe. The Fourth Circuit took the opportunity and developed a comprehensive situs test which examines function and location and is based on the plain language of the statute.

CONCLUSION

For all the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,



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APPENDIX

APPENDIX C

Decision of Administrative Law Judge Richard K. Malamphy, dated May 7, 1992: ***Sidwell v. Express Container Services, Inc.***, 26 BRBS 127 (ALJ) (1991) (ALJ No. 91-LHC-0242).

U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

CASE No. 91-LHC-242

OWCP No. 5-76027

In the Matter of

CHRISTOPHER S. SIDWELL,

Claimant,

v.

EXPRESS CONTAINER SERVICES,

Employer,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,

Party-In-Interest.

APPEARANCES:

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For The Claimant

Thomas J. Duff, Esq.,
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BEFORE:RICHARD K. MALAMPHY
Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS

This proceeding arises from a claim filed under the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 et seq. (hereinafter the "Act").

A formal hearing was held December 2, 1991 in Hampton, Virginia, at which all parties were afforded full opportunity to present evidence and argument as provided in the Act and the applicable regulations.

The findings and conclusions which follow are based upon a complete review of the entire record in light of the arguments of the parties, applicable statutory

provisions, regulations and pertinent precedent.[1]

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[1] The following abbreviations will be used as citations to the record:

CX - Claimant's Exhibits
EX - Employer's Exhibits
TR - Transcript of the Hearing

STIPULATIONS

The Employer and the Claimant stipulate, and I find:

1. At all relevant times, an employer/ employee relationship existed.

2. The Claimant sustained an injury arising out of and in the course of his employment on June 11, 1990.

3. The claim was timely filed, there was timely notice of injury, and there was timely controversion by the Employer.

4. The Claimant was paid compensation by the Employer under the state Workers' Compensation Act for the period June 12th through September 14th, 1990.

5. The Claimant's medicals were paid by the Employer under the state Workers' Compensation Act.

ISSUES

Whether this claim falls under the jurisdiction of the Act?

What is the Claimant's average weekly wage?

FINDINGS OF FACT

Testimony of Christopher Sidwell

Claimant was employed as a container mechanic at the time of his injury. (TR 14). He has been employed by Employer for fourteen (14) years, during which time he has been a member of the International Longshoreman's Association. (TR 13). He testified that his job was to repair containers, units used for importing and exporting goods, and the chassis used to carry the containers over the road. (TR 16-17) . Employer performs repairs both at shipside and at its Chautauqua Avenue site, but Claimant has worked only at the Chautauqua site since 1988. (TR 19-20, 23-24). Claimant testified that, on June 11, 1990, he was pulling a chassis from a repair bay with a Hustler when the door suddenly flew open and he almost fell out, resulting in an injury. (TR 21).

Testimony of Wayne T. Matthews

Mr. Matthews is the President of Express Container Services (hereinafter "Express") and has been for approximately 15 years. (TR 33). Express primarily repairs cargo containers and chassis. They contract directly with steamship lines and do not have any

agreement with the terminal itself or with the Virginia Port Authority. (TR 34). Mr. Matthews testified that approximately ninety (90) percent of the containers and chassis come into the site via inland roads, and that the rest come directly from the terminal. After the equipment is checked and any necessary repairs are performed, the steamship company is notified and a carrier comes to get it. (TR 36-37). Express also performs minor repair work at the terminal site by means of mobile trucks. (TR 38). Employees do not normally alternate from the shop site to the mobile trucks or vice versa, rather they work at one or the other. (TR 39). Mr. Matthews testified that he classified Claimant as a major repair mechanic assigned to work in the Chautauqua site's shop. (TR 42). Shipside work used to be available on weekends as overtime on a rotation basis to all mechanics, but that changed near the beginning of 1990 such that shop mechanics did their overtime in the shop and the terminal mechanics worked shipside. (TR 41).

Mr. Matthews testified that in 1985, the state was interested in buying Express' former location, the Hill Avenue site, to expand the terminal, so Express sought a new location. (TR 43-45). He said Express looked at a

number of sites, but the city of Portsmouth offered the best deal on the Chautauqua site, including low rate industrial revenue financing "which really sold us." (TR 45). He agreed that the Chautauqua was the closest one available to the terminal, and that it has larger bays and more storage area than the Hill Avenue site. (Tr. 46).

Testimony of Shelby West

Mr. West is the Zoning Administrator for the City of Portsmouth and has been for the last 29 years. (TR 52). Using a map, Mr. West described the area involved, including the terminal and the Chautauqua site. (EX C). He outlined the most direct route between the two, a route covering eight tenths (8/10) of a mile. (TR 54-55). He listed the businesses and properties in the immediate surrounding area, including: a sheet metal shop, a paint contractor, a row of houses, an engraving shop, a heating and air conditioning contractor, a gas station, a fire station, a container yard, a storage area owned by Nissan, a foundry, a wholesale meat distributor, a painting and sandblasting contractor, a railroad yard, and a large residential area across the highway. (TR 56-66).

He testified that Express was previously located on

Hill Avenue, adjacent to the terminal, but that they moved in 1985 to the Chautauqua site. (TR 34). He also testified that Express is located in an area zoned M-2, or heavy industrial, but that container repair can also be done in M-1, or light industrial areas.

DISCUSSION AND CONCLUSIONS OF LAW

Before 1972, coverage under the Act was determined primarily by the traditional "locality" test of maritime tort jurisdiction. This test resulted in longshoremen moving in and out of coverage as they moved from ship to pier. In 1972, Congress amended the Act to protect these so-called "amphibious workers." First, Congress extended the Act landward by including "any adjoining pier, wharf, dry dock, terminal, building way, marine way, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling or building a vessel." 33 U.S.C. § 903(a). This is traditionally referred to as the "situs" requirement. Congress also added a parallel "status" requirement limiting the landward coverage to workers "engaged in maritime employment including any longshoremen or other [person] engaged in longshore operations and any

harbor workers including a ship repairman, ship builder, and ship breaker [. . . .]" 33 U.S.C. § 902(3). It is well settled that both status and situs must be established before jurisdiction can be asserted under the Act. ***Humphries v. Director***, OWCP, 834 F.2d 372, 374 (4th Cir. 1987).

Status

Employer contends that Claimant does not satisfy the status test because his work is devoted to facilitating the movement of containers and chassis over land. I cannot agree, since it seems indisputable that continual maintenance and repair is essential to the continued use of containers in longshoring operations. The Board has held likewise on many occasions. See ***Caldwell v. Oceanic Container Service, Inc.***, 13 BRBS 153 (1980); ***Insinna v. Sea-Land Service, Inc.***, 12 BRBS 772 (1980); ***Cabezas v. Oceanic Container Service, Inc.***, 11 BRBS 279 (1979).

Situs

In interpreting Section 903(a), the "situs" test, the Supreme Court has ruled that the language of the Act is broad and should be liberally construed in order to avoid

any harsh results under this remedial type of legislation. ***P.C. Pfeiffer Co., Inc. v. Ford***, 444 U.S. 69, 74, 100 S.[ ]Ct. 328, 333, 62 L.Ed.[]2d 225, 230 (1979); ***Northeast Marine Terminal Co. v. Caputo***, 432 U.S. 249, 267-68, 97 S.[]Ct. 2348, 2359, [53] L.Ed.[]2d 320 (1977). Consequently, the Court has taken an expansive view towards the Act in order to extend coverage. Nevertheless, even with this expansive view in mind, the Court has clearly stated that "there will always be a boundary to coverage, and there will always be people who cross it during their employment." ***Herb's Welding, Inc. v. Gray***, 470 U.S. 414, 426, 105 S.[]Ct. 1421, 1429, 84 L.Ed. []2d 406, 414 (1985).

The Fourth Circuit faced the situs test in ***Humphries v. Director, OWCP***, 834 F.2d 372 (4th Cir. 1987), and acknowledged that "a covered situs need not be used exclusively for maritime purposes or be within any specified distance of navigable waters or a 'maritime operation'" in order to qualify as a maritime situs under the Act. *Id.*[] at 373-74. However, the court also recognized that boundaries to coverage do exist. ***Davis v. Doran Company of California***, 22 BRBS 3 (4th Cir. 1989). The court in *Humphries* approvingly cited the Ninth Circuit approach to determining situs boundaries enunciated in

Brady-Hamilton Stevedore Co. v. Herron, 568 F.2d 137 (9th Cir. 1987). The ***Brady-Hamilton*** test employs a four-pronged analysis in determining if an area is maritime. The four factors are:

> 1. The particular suitability of the site for the maritime uses referred to in the statute;
> 2. Whether adjoining properties are devoted primarily to uses in maritime commerce;
> 3. The proximity of the site to the waterway;
> 4. Whether the site is as close to the waterway as is feasible given all of the circumstances.

In the present case, there are no outstanding characteristics of the site that make it especially suitable for maritime use. As the Board stated in ***Motoviloff v. Director, OWCP***, 692 F.[]2d 87 (9th Cir. 1982), container and chassis repair does not require a site particularly suited to maritime purposes due to their mobile nature.

Here, ninety percent (90%) of the equipment brought into the Chautauqua site came from interstate or other inland roads. Thus, proximity to the terminal is not essential for the Employer's business.

As described by Mr. West, the properties adjacent to Express' site, as well as those en route to the terminal, are definitely not primarily devoted to maritime commerce. The wide variety of businesses enumerated above consist mainly of light commercial and industrial uses, none of which are maritime in nature, other than the one container yard. In fact, there is more residential zoning in the area than any other use, and, as such, the area hardly qualifies as 'primarily maritime' .

The third factor is proximity to the waterway. Mr. West testified that the gates of the terminal are eight tenths (8/10) of a mile from the Chautauqua facility, and, as evidenced by the map, the waterway is beyond that. The site does not adjoin or border any shipyard, railway, marine terminal or other facility used for the loading and unloading of ships, vessels or marine cargo.

The last factor looks at whether the site is as close to the waterway as feasible. In 1985, the Employer moved from its previous location, adjacent to the terminal, to its

present site. Mr. Matthews testified Express looked at various locations in different cities, but that what 'sold' them was the City of Portsmouth's offer for low-rate industrial revenue financing. The fact that Express looked at different sites, including some in Chesapeake, shows that geographical proximity to the terminal was not a primary concern.

Application of the ***Brady-Hamilton*** test shows that the Employer's Chautauqua site lacks a "functional relationship" with the navigable waters. Because situs is lacking, I need not address the average weekly wage issue.

ORDER

Accordingly, the claimant's claim for compensation under the Act is hereby DENIED for lack of subject matter jurisdiction.

RICHARD K. MALAMPHY
Administrative Law Judge

RKM/ABC/ccb
DATED: MAY 7, 1992
Hampton, Virginia